

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:) In Proceedings
) Under Chapter 11
JOHN PRIOR, d/b/a/ PRIOR OIL CO.,)
) No. BK 93-40768
Debtor(s).)
)
JOHN PRIOR,)
)
Plaintiff(s),)
)
vs.) No. ADV 94-4003
)
FARM BUREAU OIL COMPANY, TERRY)
SHARP, ANN LUTZ, JAMES LUTZ, ELVIN)
COPPLE, THE UNITED STATES OF)
AMERICA, d/b/a THE INTERNAL)
REVENUE SERVICE, TETON ROYALTY, a)
Texas Partnership, LAWRENCE BEAL,)
STATE OF ILLINOIS DEPARTMENT OF)
REVENUE, LACKEY & LACKEY, P.C.,)
and JAMES MEZO,)
)
Defendant(s).)

OPINION

This matter is before the Court on the motion of defendants, Terry Sharp, Ann Lutz, James Lutz, and Elvin Copple ("Sharp group"), to alter or amend this Court's order and opinion of January 5, 1995, in which the Court granted in part and denied in part the Sharp group's motion for summary judgment on the amended complaint of debtor-in-possession, John Prior ("trustee"). The effect of the Court's order was to avoid as preferential a transfer to the Sharp group of oil proceeds coming due the debtor from Farm Bureau Oil Company ("Farm Bureau") on or after July 16, 1993. The Court further found that the Sharp group's lien on oil proceeds coming due the debtor from June 11, 1993, to July 15, 1993, was not avoidable as a preference. The Court ruled that this

latter lien was superior to the competing lien of James Mezo ("Mezo"), which, if effective, was avoidable by the trustee as a preference.

In their motion to alter or amend, the Sharp group contends initially that the Court erred in concluding that the requirements of § 547(b)(5) had been met regarding the transfer of oil proceeds coming due the debtor on or after July 16, 1993.¹ They assert that there was no basis for the Court to find that this transfer enabled them, as unsecured creditors, to receive more than they would have received otherwise in the debtor's Chapter 7 liquidation. See Prior v. Farm Bureau Oil Company, et. al, Adv. No. 94-4003, slip op. at 19, 1995 WL 12716, at *7 (Bankr. S.D. Ill. Jan. 5, 1995). Rather, they maintain that the record showed they were fully secured by their judicial lien on the debtor's real estate so that the § 547(b)(5) element for finding a preferential transfer was not met.

The Sharp group's argument is inappropriate in the procedural context of this case and provides no basis for amending the Court's judgment. Motions for reconsideration serve the limited purpose of allowing a court to correct manifest errors of law or fact or consider

¹ Section 547(b)(5) contains one of the elements for avoiding a prepetition transfer as a preference, providing that the transfer must enable the creditor to whom payment is made

to receive more than such creditor would receive if--

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b)(5).

newly discovered evidence. Publishers Resources v. Walker-Davis Publications, 762 F.2d 557, 561 (7th Cir. 1985). They do not serve as an occasion to tender new legal theories or to present evidence which was available when the court initially rendered its decision. Id.

In this case, the Sharp group filed a motion for summary judgment and supporting brief, in which they repeatedly alleged that the only issue before the Court was the legal issue of when their lien attached to the debtor's oil proceeds. See Mot. for Summ. J., filed July 19, 1994, ¶ 3 at 1 ("Based on the stipulated facts, there exists no issue of material fact, and the court may decide the remaining legal issues of lien priority as a matter of law without a trial"); id., ¶ 7 at 2 ("The Sharp group's lien on the oil proceeds is not subject to avoidance as a preference because it did not arise within 90 days prepetition"); Brief in Supp. Summ. J., filed July 19, 1994, at 2 ("Whether [the Sharp group's] lien on the oil proceeds may be avoided as a preference turns on the timing of the attachment of the lien"). Having argued this case on the legal issue of when their lien arose, the Sharp group may not now seek redetermination of the Court's decision by raising § 547(b)(5) as a factual issue. The parties in this case stipulated that there were no issues of fact to be determined, and neither party raised the issue of whether the members of the Sharp group were fully secured creditors so as to defeat the trustee's action.² If the Sharp group had wished to challenge the

² While it might have been better to describe the Sharp group as "undersecured" rather than "unsecured" creditors, see Prior, slip op. at 19, 1995 WL 12716, *7, an undersecured creditor is, by definition, both partially secured and partially unsecured, so the

trustee's complaint on this basis, they could have filed a motion to dismiss the trustee's complaint for failure to allege § 547(b)(5) or could have filed an affirmative defense setting forth their secured status as a factual matter to be determined by the Court.

The Court's decision in this case, although rendered on a motion for summary judgment, had the conclusive effect of a trial because of the parties' stipulation that there were no issues of fact. The Sharp group had every opportunity prior to the Court's ruling to argue the § 547(b)(5) requirement and, having failed to do so, are precluded from doing so now upon a motion for reconsideration. The Court, accordingly, declines to alter its January 5, 1995, order and opinion on this ground.

The Sharp group contends further that the Court erred in concluding that the district court's turnover order of July 19, 1993, terminated the citation proceeding, creating a new lien that was avoidable as a preference. They assert that the citation proceeding is thus still pending and operates as a valid lien on the debtor's oil proceeds to the present date.

The Sharp group's argument misconstrues this Court's opinion. The Court ruled not that the turnover order created a new lien but that it

Court's choice of words was not incorrect. Since there was never any suggestion that the Sharp group were fully secured creditors, the Court was justified in presuming they were at least partially unsecured, since there would simply have been no reason to argue the issue of the timing of their lien if they had been fully secured creditors.

constituted a preferential transfer of the debtor's future oil proceeds, which were not subject to the preexisting lien created outside the 90 day preference period by service of the Sharp group's citation summons. See Prior, slip op. at 18-19, 1995 WL 12716, *7. By the terms of § 2-1402(1), the lien created by service of a citation summons binds the debtor's nonexempt property "to the time of the disposition of the citation." 735 ILCS 5/2-1402(1)(2). In this case, the Sharp group's citation lien attached to oil proceeds coming due the debtor until entry of the turnover order enforcing its lien. Once the district court entered its turnover order enforcing the Sharp group's citation lien, the parties' rights were determined by the order, not by a continuing lien on future oil proceeds.

Since § 2-1402(1) refers to "disposition" of the citation rather than to "termination" of the citation proceeding,³ the provisions of Supreme Court Rule 277(f) governing duration of the citation proceeding

³ The Court inadvertently used the term "terminated" rather than "disposed of" in describing the money to be turned over to the Sharp group by the district court's order, stating that "money to be turned over to the Sharp group . . . included proceeds from the sale of oil . . . from . . . June 11, 1993, to the date of the turnover order which terminated the citation proceeding on July 19, 1993. Prior, slip op. at 18, 1995 WL 12716 *7 (emphasis added). Any confusion caused by the use of this term should have been dispelled by the Court's later statement that

the Sharp group's citation lien covered only monies and property coming due the debtor until disposition of the citation proceeding.

Id. (emphasis added).

do not determine the extent of the lien under § 2-1402(1).⁴ Admittedly, the concluding language of § 2-1402(1) creates some ambiguity when it states that "[t]he lien [under § 2-1402(1)] is effective for the period specified by Supreme Court Rule." 735 ILCS 5/2-1402. There is no mention of a "lien" in Supreme Court Rule 277, so this reference must mean that the lien under § 2-1402(1) becomes ineffective if the citation proceeding lapses or is terminated under Rule 277(f) prior to disposition of the citation. However, where, as in this case, the citation is disposed of by an order in the citation proceeding, the lien of § 2-1402(1) is not continued by Rule 277 beyond the period specified in § 2-1402(1).⁵ Thus, the Sharp group's argument to the contrary affords no basis for altering the Court's order and opinion of January 5, 1995.

The Sharp group contends finally that the Court erred in applying § 547(e)(3) in this case to find that "transfer" of the oil proceeds

⁴ Supreme Court Rule 277(f) provides:

(f) When Proceeding Terminated. A proceeding under this rule continues until terminated by motion of the judgment creditor, order of the court, or satisfaction of the judgment, but terminates automatically 6 months from the date of (1) the respondent's first personal appearance pursuant to the citation or (2) the respondent's first personal appearance pursuant to subsequent process issued to enforce the citation, whichever is sooner. . . . Orders for the payment of money continue in effect notwithstanding the termination of the proceedings until the judgment is satisfied or the court orders otherwise.

⁵ Both subsections (1) and (2) of § 2-1402(1) governing citations directed against the judgment debtor and against third parties, respectively, state that the lien created by service of the citation summons binds the debtor's property "to the time of the disposition of the citation." 735 ILCS 5/2-1402(1)(1) and (2).

subject to their lien did not occur until the debtor acquired rights in the oil upon its extraction.⁶ They assert that the debtor had rights to the oil while it was still in the ground and that these rights continued in the oil upon its extraction and sale to Farm Bureau. They maintain, therefore, that § 547(e)(3) does not apply to delay the date of "transfer" in this case until the time the oil was extracted and the debtor became entitled to receive the oil proceeds.

The Court notes that the Sharp group's argument, if correct, would affect only oil proceeds subject to their citation lien--that is, oil proceeds coming due the debtor until the time of the district court's turnover order of July 19, 1993--and would have no bearing on this Court's ruling as to oil produced subsequent to the district court's order.⁷ Conversely, application of § 547(e)(3) in this case means that, for purposes of § 547, the "transfer" of oil produced between July 16, 1993, and July 19, 1993, if any, did not occur upon creation of the Sharp group's lien outside the 90 day preference period but was delayed until within 90 days of bankruptcy so as to be avoidable as a preference.

The Court, however, finds no merit in the Sharp group's argument

⁶ Section 547(e)(3) provides:

For purposes of [§ 547], a transfer is not made until the debtor has acquired rights in the property transferred.

11 U.S.C. § 547(e)(3).

⁷ As to these latter proceeds, the Court's § 547(e)(3) analysis constituted an additional reason for its holding that the transfer of future oil proceeds was preferential as having been made within 90 days of bankruptcy. See Prior, slip op. at 19, 1995 WL 12716 *8.

that the debtor's rights to extracted oil and its proceeds were acquired while the oil was in place prior to extraction. This argument, made without citation of authority, ignores Illinois case law holding that an oil and gas lessee's rights to extracted oil and its proceeds are acquired only when the oil is found and reduced to possession. As stated in Updike v. Smith, 39 N.E.2d 325, 327 (Ill. 1942):

Oil and gas in place in the earth can not be the subject of an ownership which is distinct from the soil because of their fugacious nature. They belong to the owner of the land so long as they remain under the land, and his grant of them to another is a grant only of such oil and gas as the grantee may find and take possession of, and no title to the oil and gas as such actually vests until it is found and reduced to possession to be used or marketed.

See also In re Fullop, 6 F.3d 422, 429 (7th Cir. 1993).

In this case, the debtor, as the owner of oil and gas leases, had an interest in oil that might be obtained from those leases in the future. However, the debtor's rights to extracted oil and its proceeds, as such, did not arise until the oil was actually produced and sold. Since, under § 547(e)(3), transfer of the oil proceeds that were subject to the Sharp group's lien could not occur until the debtor acquired rights in them, any transfer of oil produced within 90 days of bankruptcy constituted a preference. The Court, therefore, reaffirms its holding regarding the application of § 547(e)(3) to the facts of this case.

The Sharp group has filed a further motion to clarify the Court's order of January 5, 1995, regarding the priority of their claim to the funds held by Farm Bureau vis a vis competing lien claimant Mezo. Consistent with the reasoning of its January 5, 1993, opinion, the Court finds that the Sharp group's interest in oil proceeds held by Farm Bureau is superior to that of Mezo as to amounts coming due the debtor from June 11, 1993, to July 15, 1993. Since the Sharp group's lien on these proceeds is not avoidable as a preference, the Sharp group is entitled to first payment from this fund except as to Lawrence Beal, who holds a superior interest regarding oil produced from Parcel 1. See Stip. of Facts, filed July 25, 1994, ¶ 10 at 5-6. As for oil proceeds coming due the debtor on or after July 16, 1993, both Sharp and Mezo are unsecured creditors, and their rights to payment must be determined according to the debtor's Chapter 11 plan. The Sharp group's additional request that the Court clarify whether the absolute priority rule applies in this case is inappropriate at this time.

For the reasons stated, the Court finds that the Sharp group's motion to alter or amend its order and opinion of January 5, 1995, should be denied.

SEE WRITTEN ORDER.

ENTERED: March 7, 1995

/s/ KENNETH J. MEYERS
U.S. BANKRUPTCY JUDGE

